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Supreme Court, U.S.
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No. (D) 07-479

In The

Supreme Court of the United States

HUGH JOHNSON ENTERPRISES,
d/b/a CLUB HAREM,

Petitioner,

vs.

CITY OF WINTER PARK, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals, Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Eleventh Circuit's opinion requiring Club Harem to face licensing sanctions (resulting in the closure of the business) prior to seeking federal court relief conflict with and misconstrue this Court's ripeness jurisprudence?

PARTIES TO THE PROCEEDING

The parties listed in the caption are the only parties to the proceeding, specifically the City of Winter Park and Hugh Johnson Enterprises, Inc.

CORPORATE DISCLOSURE STATEMENT

Hugh Johnson Enterprises, Inc. has no parent corporation nor does any publicly held company own stock therein.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully requests this Court to issue a writ of certiorari to review the opinion of the Court of Appeals entered April 9, 2007. **App. A.**

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Hugh Johnson Enterprises, Inc. v. City of Winter Park, Florida*, 2007 U.S. App. LEXIS 8236 (11th Cir. 2007).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on April 9, 2007. Rehearing was denied by the appellate court on July 20, 2007. **App. C.** The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case implicates both the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Procedure

Club Harem filed suit contending that Winter Park's adult entertainment license suspension provisions are unconstitutional (**App. D**). The city moved to dismiss contending that Harem's claims were not ripe. The district court granted the motion (**App. B**), and an appeal followed.

B. Facts

1. Harem's Complaint

This case focuses upon the sufficiency of Club Harem's complaint and whether it presents a case and controversy. Rule 12(b)(1), Fed.R.Civ.P. Harem challenged the laws by which the City of Winter Park suspends or revokes licenses issued to adult entertainment establishments. The challenges are legal in nature and do *not* require factual development.

Club Harem and its employees are required to adhere to Winter Park's Adult Entertainment Code (subject to arrest and license penalties). See Section 14-93, Winter Park Code.[1] Club Harem is the only licensed adult entertainment establishment in Winter Park. The property has been used for adult entertainment purposes for approximately thirty years,

[1] Winter Park's Code can be accessed on the internet at www.municode.com by selecting "online library." Accordingly, the adult entertainment code which was attached to Harem's complaint is not being made part of the appendix.

offering (non-obscene) erotic-style dancing as a form of entertainment for its patrons (**App. D**, p. 2).

Club Harem was previously licensed by Orange County and operated under its adult entertainment code until 2003 when the City of Winter Park annexed Club Harem's property (and other properties on Lee Road west of Club Harem). Pursuant to Chapter 171, Florida Statutes, annexed properties must be contiguous as described and defined by statute. In other words, a municipality cannot skip over (presumably unwanted) properties and annex property beyond same. Therefore, it appears that the city was required to annex Club Harem's property in order to complete its annexation plans in 2003 (**App. D**, pp. 2-3).

On approximately March 17, 2006, Club Harem was raided by the police. The raid included agents of the Winter Park Police Department. Various arrests of patrons and employees were made.[2] Shortly after the raid, Club Harem's attorney contacted Winter Park's attorney to determine if the city was contemplating or intending to initiate licensing penalties against the nightclub. Although Winter Park's attorney stated that she would look into the matter, she

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[2] Since the filing of the lawsuit, "convictions" (as defined in Winter Park's Adult Entertainment Code) have resulted from these arrests. See Section 14-30, Winter Park Code and Section 3-6, Orange County Code (defining "conviction"). As stated above, the code can be accessed online at www.municode.com by selecting "online library."

did not follow up with a response to the nightclub's concerns (**App. D**, Tab B).

Subsequently, Club Harem obtained documents that reflect that a meeting was held at the City of Winter Park Police headquarters on December 22, 2005 – just months before the raid. During same, the lead city police detective was quoted as saying:

> Detective Cronin explained that **Winter Park would like to have Club Harem's occupational license revoked** at the end of the investigation *thus preventing them from doing any future business in Winter Park.*

(**App. D**, Tab B) (emphasis added).

Club Harem uncovered additional documents via public records requests.[3] One of these documents has a heading styled, "Winter Park City Attorney." Following this heading is the statement, "**Determine if city occupational license can be revoked**" (**App. D**, Tab B) (emphasis added).

In a letter dated August 25, 2006, Club Harem again asked if the city had any intention of seeking licensing action against the nightclub. After additional telephone calls from Club Harem's attorney, Winter Park responded with a letter dated September 6, 2006, that states in part:

> However, the city of Winter Park will continue to seek to enforce all of its laws,

[3] These public records requests were made prior to filing the lawsuit.

> ordinances, or regulations against any party who appears to be in violation of them. As such, **if Club Harem is in violation of any of the city of Winter Park's laws, ordinances, or regulations, the city of Winter Park reserves all of its rights to take the appropriate enforcement action.**

(**App. D**, Tab C) (emphasis added).

Rather than face the loss of its license under a patently unconstitutional ordinance, Club Harem sought a judgment and injunction declaring Sections 14-50 and 14-51 of Winter Park's Adult Entertainment Code unconstitutional and unenforceable – the license penalty provisions (**App. D**).

2. The City's Motion and Club Harem's Response

As pointed to in Club Harem's response to the city's motion to dismiss, there is a contradictory dynamic at work behind the scenes. On the one hand, *to date the city has refused to acknowledge* whether it is considering suspending Club Harem's license. Through this attorney the nightclub made several requests of the city to announce its intentions – prior to filing suit. On the telephone the city's attorney stated she would look into the matter, but she never returned the call. In a letter to the city, this attorney was explicit in pointing out the nightclub's concerns that licensing action was on the horizon. The letter states:

I am writing this letter as a follow up to my conversation with Ms. Collins to determine if Winter Park is contemplating or intending to seek action against Club Harem's license.

By way of background, on March 17, 2006, the Winter Park Police Department raided Club Harem (in conjunction with the M.B.I., etcetera). Shortly thereafter I telephone Ms. Collins inquiring as to whether Winter Park had any intention of taking adverse action against Club Harem's license. Ms. Collins stated she would look into the matter and let me know. To date I have had no response from Ms. Collins or any other agent of Winter Park addressing my inquiry.

During my telephone conversation with Ms. Collins I explained that I thought there were a number of legal and constitutional infirmities in Winter Park's adult entertainment code, Chapter 14 (in addition to those issues raised by Section 704, Orange County Charter), and if licensing action was contemplated by Winter Park, my client would be filing suit with the United States District Court. As a matter of professionalism I brought this matter to Ms. Collins' attention rather than immediately filing suit with the district court because if licensing action was not a consideration, same would unnecessarily tax the resources of the court and the parties.

My concerns regarding this matter have been heightened based upon a package of documents recently provided to me. These documents lead me to believe that Winter Park may have been planning (as part of the Club Harem investigation) to close the nightclub and preventing it from continuing to operate in Winter Park. For instance, an email dated January 5, 2006 recounts a meeting held at the police department on December 22, 2005. This email attributes the following statement to WPPD Detective Cronin:

> Detective Cronin explained that Winter Park would like to have Club Harem's occupational license revoked at the end of the investigation thus preventing them from doing any future business in Winter Park.

Furthermore, in the Division of Alcoholic Beverages and Tobacco Special Operations and Events Plan, there is a section titled, "Legal Assistance Needs." Under that section there is a heading titled, "Winter Park City Attorney," followed by the statement, "Determine if city occupational license can be revoked." Under another section titled, "Name of Agency," appear the words, "Winter Park City Attorney's Office," followed by the name, "*Viktoria Collins*, (407) 846-8434."

Considering this information my client is concerned that Winter Park is intending to

> take action against its license and close the business. Therefore, please advise whether Winter Park is contemplating taking action against my client's business license. Absent hearing from you in a timely manner, I can only assume that your silence in responding to this inquiry manifests Winter Park's underlying intentions.

(**App. D**, p. 2) (Emphasis added).

In the face of this pointed request the city responded with a statement that it reserved the right to take action against Club Harem's license. The city's letter did nothing to mitigate Club Harem's concerns, but instead added fuel to the fire. The matter might have been resolved if the city announced its intentions. A simple yes or no could have saved a great deal of judicial labor. The city even refused to acknowledge its intentions in the appeal before the Eleventh Circuit. Club Harem went to some lengths to explain to the trial and appellate courts the Catch-22 in which it was placed. If it waited to file suit until after the city initiated licensing action (closing the business under its code at Section 14-50(d)), the city would have assuredly filed a motion to dismiss based on abstention. On the other hand, when Club Harem filed its lawsuit in anticipation of licensing action, the city argued that the case was not ripe for review. This is an untenable position for Club Harem.

Obviously, the nightclub's concerns were prompted by the raid at Club Harem and the arrests and court cases (and subsequent "convictions") that

followed. Pursuant to the city's code, it need only obtain the requisite documentation addressing these court cases before taking adverse action against Club Harem. Pursuant to Section 14-50(d), the suspension begins five days after Winter Park mails or delivers the suspension notice to the nightclub. Instead of playing Winter Park's "sit-wait-and-wonder-game," Club Harem wants a judicial determination as to the constitutional validity of Winter Park's suspension and revocation code provisions. Finally, and at a minimum, the district court should have allowed discovery to proceed wherein Winter Park Detective Cronin (who spearheaded the Club Harem investigation) could be questioned regarding his statements that the city wished to close the nightclub.[4] The district court refused even limited discovery on the issue.

REASONS FOR GRANTING THE WRIT

There are several provisions in Winter Park's Adult Entertainment Code that Club Harem believes are facially invalid. At its core, the city's code provides that it can suspend a nightclub's business license (thus closing the business) without providing any of the procedural safeguards mandated by the United States Constitution. For instance, consider that the code states:

[4] This request was made to the court in Harem's response to the city's motion to dismiss.

Sec. 14-50. Suspension.

(c) Conviction for Violation.

(1) If three or more violations of Article XI of the Orange County Adult Entertainment Code occur at an adult entertainment establishment within a two year period, and convictions result from at least three of the violations, *the Director shall, upon the date of the third conviction, suspend the license and notify the licensee of the suspension.*[5] The suspension shall remain in effect for a period of 30 days.

* * *

(d) Effective Date of Suspension.

All periods of suspension **shall** begin five days after the date the Director mails the notice of suspension to the licensee or on the date the licensee delivers his license to the Director, whichever happens first.

As set forth within its complaint, Club Harem contends that these provisions violate the United States Constitution, including the fact that the city's

[5] Club Harem believes that the city has withheld suspending the license because of the ongoing ripeness litigation. If Club Harem waits for the license to be suspended and then re-files its suit, the city undoubtedly will argue to the district court that it should abstain under *Younger v. Harris*, 401 U.S. 37 (1971).

code does not require that the city prove that the owner or license holder was involved in the illegal conduct or was culpably responsible for same.[6] Moreover, the city's code does not require a predeprivation hearing nor does it provide for the additional constitutional safeguards that must be made available to a licensee in such a hearing, e.g., the right to present evidence, cross examine witnesses, and the requirement that the city shoulder the burden of proof by

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[6] The lower courts have been practically uniform in their determination that the suspension of a license offends constitutional principles unless the government entity establishes that the license holder was involved in the offending conduct, had knowledge of same, or was culpably responsible for it. These cases come in two forms (substantive or procedural) due process and where the business offers protected expressive activity – the First Amendment. *Lee v. City of Newport*, 1991 U.S. App. LEXIS 26785; 1991 W.L. 227750 (6th Cir. 1991); *Rameses, Inc. v. Orange County*, 481 F. Supp. 2d 1305 (MD Fla. 2007); *MDM Restaurants, Inc. v. Dearborn*, 2005 U.S. Dist. LEXIS 31744 (ED Mich. 2005); *Cohen v. Schott*, 48 So.2d 154 (Fla. 1950); *Pic 'N Save of Central Florida, Inc. v. Department of Business Regulation*, 601 So.2d 245, 250 (Fla. 1st DCA 1992) [licensee's culpable responsibility is measured in terms of intentional wrongdoing, negligence, lack of diligence in training and supervising employees]; *Heifetz v. Department of Business Regulation*, 475 So.2d 1277 (Fla. 1st DCA 1985); *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272, 297 (Colo. 1995) [strict liability license suspension provision offends First Amendment]; *Millennium Restaurants Group, Inc. v. City of Dallas*, 191 F. Supp. 2d 802 (ND Tex. 2002) [First Amendment/"*O'Brien*" analysis]; *Millennium Restaurants Group, Inc. v. Dallas*, 181 F. Supp. 2d 659 (ND Tex. 2001); *Threesome Entertainment v. Strittmather*, 4 F. Supp. 2d 710, 727-728 (ND Ohio 1998) [automatic imputation of responsibility to owner for employee acts].

clear and convincing evidence.[7] As the Court can see, Club Harem's challenges are purely legal or facial in nature and require no factual development prior to determining the code's validity.

A number of cases compel review by this Court. First, this Court has repeatedly stated that it is more inclined to find that a case is "ripe" when the challenges presented are purely legal in nature – and not contingent upon factual development in an administrative or state law proceeding. *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 202 (1983) (because question of preemption was predominantly legal, resolution of the legal issue need not await further factual development); *Environmental*

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[7] *Alexander v. United States*, 509 U.S. 544, 552 (1993) ("nor were the assets in question ordered forfeited without according petitioner the requisite procedural safeguards, another recurring theme in our prior restraint cases"); *Bell v. Burson*, 402 U.S. 535 (1971) [discussion of due process issues]; *Seminole Entertainment, Inc. v. Casselberry*, 811 So.2d 693, 696-697 (Fla. 5th DCA 2001) (right to impartial decision maker, fair hearing, notice, opportunity to cross examine witnesses, inspect documents, and to offer evidence in explanation or rebuttal); *Silver Spurs, Inc. v. Town of Palm Shores*, 1997 U.S. Dist. LEXIS 23742 (MD Fla. 1997) (city must not be vested with unrestrained discretion in revoking license); *Vicbar v. City of Miami*, 330 So.2d 46 (Fla. 3rd DCA 1976) (license constitutes property right, cannot be deprived absent due process); *Pic 'N Save of Central Florida, Inc. v. Department of Business Regulation*, 601 So.2d 245, 249 (Fla. 1st DCA 1992) (clear and convincing evidence is required evidentiary standard in order to suspend a business license).

Protection Agency v. National Crushed Stone Assoc., 449 U.S. 64, 72 (1980) (the issue was "fit" for judicial decision because it only involved a question of law); *Gardner v. Toilet Goods Assoc., Inc.*, 387 U.S. 167, 170 (1967) (issue as framed by the parties was a straightforward legal one and those issues would not necessarily be facilitated if it was required that they be raised in the context of a specific attempt to enforce the regulation). A case becomes even more compelling, supporting "ripeness," if the party will be subjected to a hardship if it is required to wait before seeking federal court review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-150 (1967).

The *hardship* to Club Harem, if the Court withholds judicial review (allowing the instant dismissal to stand), is that it will be required to stand still and simply wait for the city to unilaterally suspend its business license and close the nightclub – resulting not only in financial loss but the loss of a protected First Amendment activity, specifically the presentation of erotic-style dancing. The hardship is multiplied considering that if the lawsuit was filed after the suspension, the city will claim that Club Harem is barred from litigating the matter in federal court rather than a state forum under abstention principles. *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982) [abstention doctrine in the context of administrative proceedings]. The Court addressed this point in *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986). There, this Court found that the case

was ripe when the state initiated administrative proceedings against Dayton Schools, but those same state proceedings required the federal courts to abstain. *Id.* at 626, n.1 and 627-628. Club Harem, recognizing what this Court stated in *Dayton Christian Schools*, is attempting to prevent the same scenario from playing out here.

Contrary to the position of the Eleventh Circuit, this Court has never required that a party be directly injured prior to seeking relief with the federal courts; it is enough that an injury is threatened or impending. *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983). The thrust of the Eleventh Circuit's opinion is just the opposite. It requires that the city take action against Club Harem prior to the nightclub seeking federal court intervention.

> Consequently, the city has taken no concrete or cognizable action to suspend or revoke Club Harem's license. Because it has suffered no action to suspend or revoke its license whatsoever from Winter Park through its adult entertainment ordinance, Club Harem's challenge to the constitutionality of the Winter Park adult entertainment code is premature and unripe for adjudication.

App. A at 7-8.

The Eleventh Circuit also failed to note that a key factor in determining whether a case is "fit" for

review is whether the city has disavowed its intentions of moving against Club Harem's license.

> **Moreover, the state has not disavowed any intention of invoking** the criminal penalty provision against unions that commit unfair labor practices. Appellees are thus not without some reason in fearing prosecution for violation of the ban on specified forms of consumer publicity.

Babbitt v. United Farm Workers National Union, 442 U.S. 289, 302 (1979). The nightclub repeatedly requested that the city announce its intentions and the city has repeatedly refused to do so at both the district *and* appellate court levels. Rather, before the appellate court, the city sidestepped the issue by stating "**[o]n the record before you,** there has not been any discussion of revoking the club's adult entertainment license . . . " City's Answer Brief at p. 18 (Emphasis added). "**On this record**, the city has not taken the position that Club Harem is in violation of the adult entertainment code, . . . " City's Answer Brief at p. 13 (Emphasis added). Despite this cagey language, the city's refusal to disavow or state its intention establishes that Club Harem's concerns are not hypothetical. The Third Circuit Court of Appeals explained the significance of this issue in *The Presbytery of New Jersey v. Florio*, 40 F.3d 1454 (3rd Cir. 1994).

> The district court did opine, however, that "even if the church's members were parties, nothing in the record indicates any realistic

> threats that the state will enforce the amendment against them. (Citation omitted). **That conclusion is open to doubt considering the state's *refusal to negate* in its affidavit an intention to enforce the statute** against members of the Orthodox Presbyterian Denomination in the secular activity.

Florio at 1463, n.7 (Emphasis added).

* * *

> The affidavit did not, however, **disavow** enforcement against the members of the church for their public activities nor does it preclude enforcement against Cummings for his activities outside the church.

Florio at 1461 (Emphasis added).

Winter Park's refusal to disavow its intentions also explains why it opposed oral argument before the Eleventh Circuit. City's Answer Brief. "Statement Regarding Oral Argument." After all, at oral argument the appellate court could have questioned Winter Park's attorney regarding the meeting held at police headquarters or the city's plans to move against Club Harem's license.

> Here the state has forsworn prosecution of Cummings in his clerical role, *but it has refused to forswea* his prosecution if he were to step off the pulpit and engage in the activities he alleges his First Amendment right to freedom of expression protects. **The pointed nature of that refusal**, both in

> the state affidavit and **at oral argument** indicates to us that Reverend Cummings and others who engage in the expressive activity he describes faces a real threat of prosecution.
>
> * * *
>
> Here, the state has had ample opportunity to indicate that it will not prosecute religiously motivated speakers under the aid and abet or boycott provisions. It has elected not to do so.

Florio at 1468; *Lake Carriers Association v. MacMullan*, 406 U.S. 498, 508, n.11 (1972) [representations made by appellees at oral argument reinforced court's conclusion].

To summarize, the Eleventh Circuit's opinion conflicts with precedent from this Court on several important points. First, this Court has never required that a plaintiff suffer a cognizable or concrete injury prior to federal court review. Rather, this Court has clearly stated that the standard is not whether an actual injury has occurred but whether an injury has been threatened or is impending. Second, this Court has likewise (implicitly) recognized that a party is not required to suffer an actual injury (in this case, a suspension action and loss of license) which may result in the federal court abstaining under *Younger* principles. Stated differently, Club Harem should not be required to wait to receive the "suspension letter" that could bar its federal lawsuit under *Younger*. Third, this Court has pointed out that when a party

refuses to disavow its intentions, the "refusal" inures to the benefit of the plaintiff and a finding of ripeness. Fourth, because this case involves a facial determination of the legal sufficiency of Winter Park's code, the Eleventh Circuit should have found that Club Harem's complaint presented a live controversy.

CONCLUSION

Based upon the foregoing, Hugh Johnson Enterprises, Inc. requests that this Court grant its petition.

Respectfully submitted.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15817
Non-Argument Calendar

D.C. Docket No. 06-01402-CV-ORL-31-JGG

HUGH JOHNSON ENTERPRISES, INC.,
doing business as Club Harem,

Plaintiff-Appellant,

versus

CITY OF WINTER PARK, FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(April 9, 2007)

Before TJOFLAT, BIRCH and HULL, Circuit Judges.

PER CURIAM:

Hugh Johnson Enterprises, Inc., d/b/a Club Harem, appeals the dismissal of its complaint as not being ripe for adjudication and lacking subject-matter jurisdiction. We AFFIRM.

I. BACKGROUND

Club Harem, owned and operated by Hugh Johnson Enterprises, Inc., is the only licensed adult-entertainment establishment in Winter Park, Florida. The property on which the club is located has been used for adult entertainment, non-obscene erotic dancing, for approximately thirty years. Previously, Club Harem was licensed by Orange County and operated under its adult-entertainment code. In 2003, the City of Winter Park annexed the property on which Club Harem is located and other properties on Lee Road west to Interstate 4.

On March 17, 2006, Club Harem was raided by Winter Park police. Various arrests of patrons and employees occurred. Thereafter, Club Harem's attorney contacted the attorney for the City of Winter Park to ascertain whether the city was contemplating or intending to initiate licensing penalties against the nightclub. Following requests for documents, counsel for Club Harem learned that (1) at a meeting at Winter Park police headquarters on December 22, 2005, a detective had stated that the city would like to prevent Club Harem from doing future business by having its license revoked, (2) a document instructed that a determination of whether Club Harem's city occupational license could be revoked be made, and (3) a response letter dated September 5, 2006, from the assistant city attorney to Club Harem's counsel's letter asking if the city intended to pursue a licensing action against the nightclub, states in pertinent part:

> *Please be advised that there is no pending proceeding to revoke Club Harem's license.* However, the City of Winter Park will continue to seek to enforce all of its laws, ordinances, or regulations against any party who appears to be in violation of them.
>
> As such, if Club Harem is in violation of any of the City of Winter Park's laws, ordinances, or regulations, the City of Winter Park reserves all of its rights to take the appropriate enforcement action.

R1-1 at Tab C (emphasis added). Rather than face the loss of its license under an allegedly unconstitutional ordinance, Club Harem sought a declaratory judgment and injunction, which would decide that the Winter Park Adult Entertainment Code, sections 14-50 (Suspension) and 14-51 (Revocation), are unconstitutional and unenforceable. The district judge granted Winter Park's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) and concluded that Club Harem's action was not ripe for adjudication and that the court lacked subject-matter jurisdiction. This appeal ensued.

II. DISCUSSION

We review the granting of a motion to dismiss under Rule 12(b)(6) *de novo* and apply the same legal standard used by the district court. *Hoffman-Pugh v. Ramsey,* 312 F.3d 1222, 1225 (11th Cir. 2002). " 'When considering a motion to dismiss, all facts set forth in

the plaintiff's complaint are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto.'" *Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342, 1352 (11th Cir. 2006) (citation omitted). Based on the facts as stated in the complaint and attached exhibits, the threshold decision is ripeness.

The United States Constitution limits the jurisdiction of federal courts by permitting them to consider only disputes that rise to the level of being "Cases" or "Controversies." U.S. Const. art. III, § 2; *National Adver. Co. v. City of Miami*, 402 F.3d 1335, 1338 (11th Cir. 2005) (per curiam) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 112 S.Ct. 2130, 2136 (1992)), *cert. denied*, ___ U.S. ___, 126 S.Ct. 1318 (2006). "The ripeness doctrine protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997). The two-step "ripeness inquiry requires a determination of (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *Id.* The court must determine "'whether there is sufficient injury to meet Article III's requirement of a case or controversy and, if so, whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decisionmaking by the court.'" *Id.* (citation omitted).

The plaintiff corporation in *Digital Properties* sought to open an adult book and video store, although Digital had obtained prior legal advice that the municipal zoning code did not allow adult book and video stores anywhere in the city. Based on the rationale that the restriction made the zoning code unconstitutional and unenforceable, Digital filed in federal court a case challenging the municipal zoning scheme as unconstitutional. The city filed a motion to dismiss for lack of subject-matter jurisdiction under the ripeness doctrine, and the district judge granted the motion in part because Digital's "rush to the courthouse was premature." *Id.*

On appeal, we concluded that Digital had failed to present a ripe claim for review, because it did not pursue its claim with the requisite diligence to show that a mature claim or controversy existed. *Id.* at 590. We reasoned "that Digital's presumption of constitutional infirmity bred impatience and prompted it to file an unripe claim," when the ripeness doctrine requires a formalized decision from a governmental authority, "and its effects [must be] felt in a concrete way by the challenging parties." *Id.* (quoting *Abbott Labs. v. Gardner*, 387 U.S. 135, 148-49, 87 S.Ct. 1507, 1515 (1967)). We explained that "Digital's impatience *precluded* the formation of a concrete case or controversy"; because there was no tangible controversy, the federal courts were without authority to act. *Id.* (emphasis added). Therefore, we concluded that Digital's "anticipated belief" that the city would interpret its code in a way that violated Digital's

rights was insufficient to meet the ripeness standard; consequently, there was no subject-matter jurisdiction over the dispute. *Id.* We have recognized that, to challenge the constitutionality of government action, a proponent has the obligation to obtain a conclusive and definitive government decision regarding the alleged unconstitutional application of the legislation questioned.[1] *National Adver.*, 402 F.3d at 1340 (citing *Digital Properties*, 121 F.3d at 590).

The Winter Park Adult Entertainment Code, attached to Club Harem's complaint, states the procedures for suspension and revocation of an adult entertainment license in sections 14-50 and 14-51. An adult-entertainment license may be suspended for thirty (30) days for "three or more violations of article VI of the Orange County Adult Entertainment Code" within a two-year period, if there is a conviction. Winter Park Adult Entertainment Code § 14-50(c)(1). After a first suspension, then another conviction can result in a ninety-day suspension. *Id.* at § 14-50(c)(2). Finally, if a license has been suspended for ninety

[1] The city has argued that Club Harem has confused an occupational license for a business with an adult-entertainment license. Its contention is that the reference to a business license in Club Harem's correspondence with the city's attorneys, attached as exhibits to its complaint, means an occupational license rather than an adult-entertainment license. Counsel for Club Harem refutes this assertion in his reply brief. Reply Br. at 5-6. Because Club Harem is the only licensed adult entertainment business in Winter Park, we conclude that the business license that Club Harem is challenging in its complaint for declaratory judgment and injunctive relief is its license for adult entertainment and not its occupational license required for all businesses.

days, and there is within two years of the conviction leading to that suspension another conviction, then the license can be suspended for 180 days. *Id.* at § 14-50(c)(3). Absent false information in the application process, an adult-entertainment license can be revoked only if, within two years of the conviction that led to the 180-day suspension, there is another conviction. *Id.* at § 14-51(b)(1).

Club Harem has not alleged that there have been any suspensions or convictions under the Winter Park Adult Entertainment Code. All that Club Harem's complaint alleges is that the City of Winter Park has an inchoate desire to use the city's Adult Entertainment Code to revoke Club Harem's license based on a comment by a detective of the Winter Park Police Department that he would like to see the revocation process occur. Absent from the complaint is any allegation that the city has taken identifiable steps to revoke Club Harem's license. Moreover, in response to inquiry by Club Harem's counsel, the assistant city attorney responded that no revocation proceeding regarding Club Harem was pending. Consequently, the city has taken no concrete or cognizable action to suspend or revoke Club Harem's license. Because it has suffered no action to suspend or revoke its license whatsoever from Winter Park through its adult entertainment ordinance, Club Harem's challenge to the constitutionality of the Winter Park Adult Entertainment Code is premature and unripe for adjudication. Therefore, the district judge properly dismissed Club Harem's complaint under Rule 12(b)(6).

III. CONCLUSION

Club Harem has appealed the dismissal of its complaint challenging the constitutionality of the Winter Park Adult Entertainment Code. Because the city has taken no steps to suspend or revoke Club Harem's adult entertainment license, Club Harem's request for preliminary constitutional adjudication of the ordinance is not ripe, and subject-matter jurisdiction is lacking. Accordingly, the district judge's dismissal of Club Harem's complaint is **AFFIRMED**.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HUGH JOHNSON ENTERPRISES, INC. d/b/a Club Harem,

Plaintiff,

-vs-

Case No. 6:06-cv-1402-Orl-31JGG

CITY OF WINTER PARK, FLORIDA,

Defendant.

ORDER

(Filed Oct. 30, 2006)

Upon consideration of Defendant's Motion to Dismiss (Doc. 7) and Plaintiff's Opposition thereto (Doc. 9), the Court finds that this potential dispute is not ripe for adjudication and that the Court lacks subject matter jurisdiction. It is, therefore

ORDERED that Defendant's Motion is GRANTED. Plaintiff's Complaint is DISMISSED, without prejudice and the Clerk is directed to close the file.

DONE and **ORDERED** in Chambers, Orlando, Florida on October 30, 2006.

/s/ Gregory A. Presnell
GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15817-CC

HUGH JOHNSON
ENTERPRISES, INC.,
doing business as Club Harem,
Plaintiff-Appellant,

versus

CITY OF WINTER PARK, FLORIDA,
Defendant-Appellee

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Jul. 20, 2007)

Before: TJOFLAT, BIRCH and HULL, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch Jr.
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HUGH JOHNSON ENTERPRISES, INC. d/b/a CLUB HAREM,

Plaintiff,

v.

CITY OF WINTER PARK, FLORIDA

Defendant.

CASE NO.:
6-06-CV-1402-ORL-31JGG

CLUB HAREM'S COMPLAINT FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION CHALLENGING PROVISIONS IN WINTER PARK'S ADULT ENTERTAINMENT CODE

(Filed Sep. 14, 2006)

Plaintiff, **HUGH JOHNSON ENTERPRISES, INC.**, d/b/a Club Harem, (hereinafter "Club Harem"), by and through undersigned counsel, sues Defendant, **CITY OF WINTER PARK**, (hereinafter "the City" or "Winter Park"), and in furtherance states:

I
JURISDICTION

1. This action arises under the First and Fourteenth Amendments to the United States Constitution. This court has jurisdiction over this matter pursuant to 28 U.S.C. §§1331, 1343; 42 U.S.C. §§1983 and 1988.

II
VENUE

2. Venue properly lies within the territorial jurisdiction of this court in that the cause of action and the subject matter of the suit involves Winter Park's Adult Entertainment Code, Winter Park, Middle District, Florida. See 28 U.S.C. §1391(b). A copy of Winter Park's Adult Entertainment Code is attached hereto as **Tab A**.

III
PARTIES

3. Hugh Johnson Enterprises, Inc. is a Florida corporation doing business as "Club Harem" in Winter Park, Orange County, Florida.

4. Defendant, City of Winter Park, is a Florida municipality organized and operated under the constitution and laws of the State of Florida.

IV
FACTS

5. Club Harem is challenging the laws/ordinances by which the City of Winter Park suspends or revokes licenses issued to adult entertainment establishments. The owner of Club Harem as well as the dancers and employees employed by same are required to adhere to Winter Park's Adult Entertainment Code. It is believed there is only one licensed adult entertainment establishment operating in Winter Park, specifically, Club Harem.

6. Club Harem is a licensed adult entertainment establishment located at 2600 Lee Road, Orange County, Winter Park, Florida. The property has been used for adult entertainment purposes for approximately thirty years. Club Harem offers (non-obscene) erotic-style dancing as a form of entertainment for its patrons.

7. Until 2003-2004, Club Harem's location was designated unincorporated Orange County and it was licensed and operated under Orange County's Adult Entertainment Code, Chapter 3. In approximately 2003, the City of Winter Park initiated annexation of properties on Lee Road west to Interstate 4, including areas along Wymore Road.

8. Under Florida law (Chapter 171, Florida Statutes), properties to be included in an annexation must be contiguous as described and defined by state statute. In other words, a municipality cannot skip

over [presumably] unwanted property and annex properties beyond same.

9. Considering this, it appears that the City of Winter Park was required to annex the property upon which Club Harem operates in order to complete its annexation plans to include properties on Lee Road, west of the nightclub.

10. The plaintiff holds a license to operate issued by the City of Winter Park pursuant to its adult entertainment code.

11. On approximately March 17, 2006, Club Harem was raided by police authorities, including agents from the Winter Park Police Department. Various arrests of patrons and employees were made.

12. Shortly after the raid, Club Harem's attorney contacted an attorney for the City of Winter Park, Viktoria Collins, to determine if the City of Winter Park was contemplating or intending to suspend or initiate licensing penalties against Club Harem's license. Ms. Collins relayed that she would look into the matter but did not follow up with a response addressing Club Harem's concerns.

13. Subsequently, Club Harem obtained documents which reflect that a meeting was held at the City of Winter Park Police headquarters on December 22, 2005. During same, a Winter Park Police detective was quoted as saying:

> Detective Cronin explained that Winter Park would like to have Club Harem's occupational license revoked at the end of the investigation thus preventing them from doing any future business in Winter Park.

14. Club Harem also uncovered additional documents via public records requests. One of these documents has a heading styled, "Winter Park City Attorney." Following this heading is the statement, "Determine if city occupational license can be revoked."

15. In a letter dated August 25, 2006, Club Harem inquired if the city had any intention of seeking licensing action against Club Harem's license to operate. See **Tab B**.

16. After additional telephone calls from Club Harem's attorney Winter Park responded with a letter dated September 6, 2006, which states in part:

> However, the city of Winter Park will continue to seek to enforce all of its laws, ordinances, or regulations against any party who appears to be in violation of them. As such, if Club Harem is in violation of any of the city of Winter Park's laws, ordinances, or regulations, the city of Winter Park reserves all of its rights to take the appropriate enforcement action.

Tab C.

17. Club Harem contends (as set forth in more detail below) that Winter Park's Adult Entertainment

Code, specifically the sections addressing the suspension or revocation of a license, is unconstitutional.

18. Rather than face the loss of a license under a patently unconstitutional ordinance, Club Harem is seeking a judgment and injunction declaring Sections 14-50 and 14-51 of Winter Park's Adult Entertainment Code unconstitutional and unenforceable.

V
CHALLENGES

19. Sections 14-50 and 14-51 of Winter Park's Adult Entertainment Code are unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution in that they do not require Winter Park to shoulder the burden of establishing by clear and convincing evidence that the owner of the adult establishment was personally or culpably responsible (legally speaking) for the conduct ("violation") which forms the basis for the license suspension/revocation.

20. Sections 14-50 and 14-51 of Winter Park's Adult Entertainment Code are unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution in that they do not provide for a pre-deprivation hearing which comports with fair process including but not limited to the right to call and cross examine witnesses and to present evidence.

21. Sections 14-50 and 14-51 of Winter Park's Adult Entertainment Code are unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution in that they do not provide for a definition of "violations" or "convictions," thus providing the city of Winter Park unconstrained discretion in determining when a suspension or revocation will be imposed.

22. Sections 14-50 and 14-51 of Winter Park's Adult Entertainment Code are unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution in that they do not provide any time table by which the city must initiate and notify the holder of an adult entertainment license that it is seeking to suspend or revoke the license. The failure to include such a time table not only prejudices the license holder (owner) but allows the city to unlawfully and strategically stack a suspension or revocation by manipulating the sequence and timing of the notification to the owner/license holder. Because there is no time frame in which the "director" must notify a license holder of the suspension/revocation, the license holder is foreclosed from timely remedying any improper conduct and from showing lack of culpability.

23. Sections 14-50 and 14-51 of Winter Park's Adult Entertainment Code are unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution Sections in that they do not provide for the appointment of a neutral and

detached fact finder and adjudicator during the required pre-deprivation hearing.

24. Sections 14-50 and 14-51 of Winter Park's Adult Entertainment Code are unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution in that they do not provide for (prompt) judicial review of any licensing penalty imposed by the city.

25. Sections 14-50 and 14-51 of Winter Park's Adult Entertainment Code are unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution in that they do not provide for an automatic abatement or stay of a license penalty (suspension or revocation) pending judicial review.

26. Section 14-51(c) of Winter Park's Adult Entertainment Code is unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution because it forever forecloses the property owner from making use of its property for adult entertainment purposes. Thus, the revocation of a license results in the complete prohibition of erotic dancing at a location designated for such purposes–in this case, property which has been used for this purpose for approximately thirty years.

VI
CLAIMS

COUNT ONE
DECLARATORY JUDGMENT

27. The plaintiff realleges and adopts each and every fact set forth in all preceding paragraphs of this Complaint as if fully set forth herein.

28. There is a substantial and actual justiciable controversy over plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution as those rights will be affected by the enforcement of Winter Park's Adult Entertainment Code, Sections 14-50 and 14-51.

WHEREFORE, the Plaintiff urges this Court as follows:

a. To issue a judgment declaring Winter Park's Adult Entertainment Code, Sections 14-50 and 14-51 unconstitutional under the First and Fourteenth Amendments to the United States Constitution; and

b. To award the plaintiff its costs and reasonable attorney's fees. 42 U.S.C. §§1983 and 1988.

COUNT TWO
PERMANENT INJUNCTION

29. The plaintiff realleges and adopts each and every fact set forth in all preceding paragraphs of this Complaint as if fully set forth herein.

30. The plaintiff has a clear legal right to offer erotic-style (non-obscene) dancing as protected under the First Amendment to the United States Constitution.

31. The plaintiff will suffer irreparable injury if an injunction is not issued. The loss of constitutional and First Amendment rights is so serious that, as a matter of law, irreparable injury is presumed. The loss of Club Harem's license will act to prevent it from offering a constitutionally protected activity, specifically erotic-style dancing.

32. The plaintiff has no adequate remedy at law. In cases involving the loss of constitutional and First Amendment rights, such as in this case, damages are both inadequate and unascertainable.

33. The public interest would be served by the granting of injunctive relief. In fact, the public interest is disserved by an unconstitutional ordinance which interferes with the public's rights under the First Amendment.

WHEREFORE, the Plaintiff urges this Court as follows:

a. To issue a permanent injunction forever prohibiting the City of Winter Park and its agents from enforcing its adult entertainment code, Sections 14-50 and 14-51, against the plaintiff and other individuals similarly situated; and

b. To award the plaintiff its costs and reasonable attorney's fees. 42 U.S.C. §§1983 and 1988.

Respectfully submitted this 14th day of September, 2006, at Orlando, Orange County, Florida.

BY: /s/ Steven G. Mason
STEVEN G. MASON
FLORIDA BAR #842508

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 14, 2006, the foregoing Complaint was filed with the **Clerk of the Court**, United States District Court, 80 N. Hughey Avenue, Orlando, FL 32801.

BY: /s/ Steven G. Mason
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FLORIDA BAR #842508
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[EXHIBITS OMITTED IN PRINTING]